IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 77-1006

FRANKLIN NEIL JACEK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OTHER AUTHORITIES

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Petitioner prays that a Writ of Certiorari issue to review a part of the Judgment and Decision of the United States Court of Appeals, for the Sixth Circuit, entered on

October 21, 1977 which affirmed the conviction of your Petitioner for aiding and abetting in the counterfeiting of 50 cent postage stamps in violation of 18 U.S.C. § 501 and 2.

Petitioner claims as fundamental error and clearly erroneous that portion of the Order and Judgment of the Sixth Circuit Court of Appeals which found without merit and rejected Petitioner's argument that the inconsistant statements of the accomplice witness, Donald Howie, which were obvious from the record, and which constituted the only evidence directly linking your Petitioner to the forging and counterfeiting of 50 cent postage stamps, made it encumbent on the trial court to give specific cautionary instruction on the testimony of the said accomplice.

If the Sixth Circuit Court of Appeals had recognized the merit of Petitioner's claim as set fourth above, it would have reversed the judgment of the trial court, and remanded the cause for a new trial.

OPINIONS BELOW

The Opinion of the United States Court of Appeals, Sixth Circuit, dated October 21, 1977, affirming the conviction of your Petitioner is reported at ————F.2d———— printed as Appendix "A" hereto.

The Order of the United States Court of Appeals, Sixth Circuit, dated December 7, 1977, granting Petitioner's Motion for Leave to File a Petition for Rehearing Out of Time but denying Petitioner's Petition for Rehearing is printed as Appendix "B" hereto.

JURISDICTION

The Opinion of the United States Court of Appeals, Sixth Circuit, from which Certiorari is sought was entered on October 21, 1977. Petitioner's Petition for Rehearing was denied on December 7, 1977.

Jurisdiction of this Court is involked under Title 28, U.S.C. § 2101, and Rule 19 (b), Supreme Court Rules.

QUESTIONS PRESENTED

The Order, Judgment and Decision of the United States Court of Appeals, Sixth Circuit, dated October 21, 1977, from which Certiorari is sought herein, affirmend the Judgment of the United States District Court for the Eastern District of Tennessee.

1. The questions presented on this Petition are:

Did the trial court commit plain and reversible error by failing to give a specific cautionary instruction on the testimony of the accomplice witness, where said witness' testimony constituted the only evidence directly linking your Petitioner to the crime charged; and where said witness' testimony was contradictory and thus, was the Order and Judgment of the Sixth Circuit Court of Appeals of October 21, 1977, which affirmend the trial court, fundamental and clear error depriving Petitioner of his right to a fair trial under the Fifth and Sixth Amendments of the United States Constitution?

2. Was the Order and Judgment of the Sixth Circuit Court of Appeals dated October 21, 1977 in conflict with the decision of the Fifth Circuit Court of Appeals on the same matter, as set fourth herein.

CONSTITUTIONAL PROVISIONS

1. United States Code Annotated. Const. Amnedment V.

AMENDMENT V

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. United States Code Annotated. Const. Amendment VI.

AMENDMENT VI

JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

of the State and district wherin the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Councel for his defense.

STATEMENT

I

NATURE OF THE CASE

This petition emanates from the Order, Judgment or Decision of the Sixth Circuit Court of Appeals, which affirmed the conviction of your Petitioner of Count I of a Two Count Indictment which charged your Petitioner with counterfeiting $200,000.00 worth of 50 cent stamps in violation of 18 U.S.C. § 501 and 2.

The Sixth Circuit Court of Appeals held that your Petitioner's Assignment of Error Number 111, pertaining to the failure of the Trial Court to give a specific cautionary instruction on the testimony of the acknowledged accomplice, Donald Howie, did not warrant extended treatment, and simply stated that the District Court fairly instructed the jury on all the applicable issues.

II

PERSONS INVOLVED

THE PETITIONER: FRANKLIN NEIL JACEK, also known for the past ten (10) years as Frank Royce is a resident of Fort Lauderdale, Florida and is 54 years old.

THE RESPONDENT: The United States of America, as represented by the United States Attorney for the Eastern District of Tennessee.

III

THE CASE

Your Petitioner was charged, along with James Arthur Charlton, James Francis Swartz and Donald Lee Howie with aiding and abetting each other in the forging and counterfeiting of approximately Two Hundred Thousand ($200,000.00) Dollars worth of fifty cent postage stamps.

In addition, James Arthur Charlton was named in the second count of this Two Count Indictment along with Mark A. Charlton and Donald Lee Howie with knowingly possessing with the intent to use and sell about Two Hundred Thousand ($200,000.00) Dollars worth of forged and counterfeited fifth cent postage stamps.

The case was called for trial before a jury on December 19, 1975 and prior to the impanelling of the jury, defendant Donald Lee Howie entered his plea of guilty to the Two Counts of the Indictment. Mr. Howie was then subpoenaed as a government witness and did testify.

In his testimony, Howie stated that he had a specific conversation with your Petitioner pertaining to the printing and distribution of an "adult" book.

Howie testified later about a second conversation in Alcoa, Tennessee at which your Petitioner was present, at which a need for money was discussed. As a result of the conversation, Howie obtained $2,500.00 for Royce for an unknown purpose.

Your Petitioner was implicated in the counterfeiting charge primarily by Howie's testimony that James Charlton was to print the stamps and Mr. Royce was to get "fifty-two (52%) percent".

Mr. Howie later described getting stamps from James Charlton in the Maryville-Knoxville area, placing them into two suitcases and being driven to Atlanta by Charlton's son where het met only his girlfriend.

Howie boarded a plane at Atlants that same afternoon, went to Fort Lauderdale where he was met by Mr. Swartz and Mr. Royce.

They put the suitcases in the trunk of Mr. Swartzs' car, took them to Mr. Royce's house and Mr. Royce put them into his car, according to the accomplice Howie.

Howie then stated that he does not know what happened to the stamps.

This testimony comprised the only evidence linking your Petitioner to the crime for which he was convicted.

Your Petitioner testified in his defense that he met Howie at the Fort Lauderdale Airport with Mr. Swartz at Mr. Swartzs' request.

When Howie informed your Petitioner that he had 50 cent stamps, your Petitioner testified that he told Howie to get them out of here.

Your Petitioner then testified , contrary to Howie's testimony that Howie left with the stamps and took them up to Atlanta the next day. That, while in Doris Cross's apartment, Howie opened up the suitcase in front of Swartz and several witnesses, and showed them the stamps.

It is of particular significance that the Affidavit for Search Warrant, which was introduced into evidence by the Defendants, James Arthur Charlton, Mark A. Charlton and your Petitioner on a Motion to Supress Hearing, prior to trial, stated the following.

> "Mr. Jim Wise, Huntsville, Alabama, provided information to Postal Inspectors Weaver and Paul Cummerdord at Huntsville, Alabama, on Wednesday, June 18, 1975. That on June 7, 1975 at 805 Taft Avenue, Southeast, Atlanta, Georgia he saw in the possession of Donald Lee Howie and Jimmy Swartz two (2) suitcases and that the suitcases were opened in his presence and he saw the two suitcases contained sheets of U.S. postage stamps . ."

The Affiant, Ronald E. Siemanski further related statements made to him demonstrating that the stamps were counterfeit.

Mr. Howie presented a chronological presentation of the events beginning with his first knowledge of the counterfeit stamps through his arrest on July 9. 1975.

Yet the only trip to Atlanta discussed by Mr. Howie prior to his meeting Swartz and Royce at the Fort Lauderdale Airport, was when he met with his girlfriend and no one else.

Obviously, the meeting in Atlanta set fourth in the abovementioned Affidavit occurred after the meeting in Fort Lauderdale between Howie, Swartz, and Royce.

Yet, on one hand, Howie unequivocally states that he does not know what happened to the stamps after this Fort Lauderdale meeting while the aforementioned Affidavit has Howie present at a meeting in Atlanta where the stamps and suitcases were in his possession, after the Fort Lauderdale meeting.

The only alternative to this Atlanta meeting taking place after the Fort Lauderdale meeting is if Howie had somehow forgotten about this second Atlanta meeting which somehow took place between the time Howie learned of the counterfeit stamps and the time of the above-mentioned Fort Lauderdale meeting.

Yet, even this remote alternative would throw considerable suspicion upon the testimony of Howie.

Thus, the testimony of Howie as to your Petitioner is incredible or otherwise unsubstantial on its face.

Circumstantial evidence in the above-captioned case does not corroborate Howie's testimony in regard to your Petitioner, but in fact tends to disprove it.

For, the chronology of the case support your Petitioner's testimony that he told Howie that he did not want the stamps and that Howie:

> "left with the bags and Mr. Swartz and his wife were leaving the next day (for Atlanta). Then I got a call from Mr. Swartz that Mr. Howie had those stamps up in Atlanta at Doris Cross' apartment and opened them up in front of several witnesses there and Mr. Swartz was there . . ."

All of the factors mentioned by the United States Attorney on page 13 of the Brief and Appendix for Plaintiff-Appellee are equally or more consistent with your Petitioner's account of the book printing venture between himself, Howie, and other co-defendants (which Howie himself testified to); as well as your Petitioner's refusal to accept or even look at the stamps in issue, as it is with the Government's contentions.

In addition thereto, your Petitioner's testimony is consistent with the Affidavit for Search Warrant referred to herein, just as the testimony of the accomplice Howie is Inconsistent therewith.

The circumstantial evidence of the presence of the two suitcases and stamps at the Atlanta meeting mentioned in the said Affidavit, the time sequence apparent from the record as a whole, cooroborates you Petitioner's account of the facts, just as it belies that of the accomplice witness, Howie.

Despite the above, the trial court failed to give a specific cautionary instruction on the testimony of the accomplice witness, Donald Lee Howie.

After completion of the trial on Friday, December 19, 1975, the jury returned its deliberations on Saturday, December 20, 1975, and subsequently returned a verdict of guilty on both counts of the Indictment as to James Arthur Charlton, a verdict of guilty as to your Petitioner on Count One of the Indictment, a verdict of guilty as to Mark A. Charlton on both counts of the Indictment, and a verdict of guilty as to James Francis Swartz on Count One of the Indictment.

On January 22, 1976, your Petitioner received a sentence of five years on Count One of the Indictment, said sentence was subject to Title 18, U.S.C. § 4208 (a) (2).

STATUS OF THE LITIGATION

Your Petitioner perfected his Appeal to the Sixth Circuit Court of Appeals which denied same October 21, 1977.

On December 7, 1977, the Sixth Circuit Court of Appeals denied Petitioner's Petition for a Rehearing.

This Petition emanates from a portion of that Order, Judgment of Decision of the Sixth Court of Appeals,

which rejected an assertion by the Petitioner that the trial court violated his fundamental right to a fair trial by failing to give a specific cautionary instruction on the testimony of the accomplice, Donald Lee Howie.

REASONS FOR GRANTING THE WRIT

It is clearly fundamentally erroneous for the Sixth Circuit Court of Appeals to permit Petitioner's conviction to stand where the trial court failed to give specific cautionary instructions on the testimony of the accomplice, where that testimony was un-corroborated and, as seen from an examination of the record contradictory.

The ruling of the Sixth Circuit Court as set fourth above was clearly in conflict with decision of the Fifth Circuit Court of Appeals on the same matter.

In Williamson v. United States 332 F. 2d 123 (C.A.51964) the Fifth Circuit Court of Appeals held that it was reversible error for the trial court to fail to give a charge on accomplice's testimony, even though not requested by the defendant, in that the record revealed that a fair trial required that the jury be properly instructed on the evaluation and use of accomplice testimony.

The court stated on page 127 that.

> "It aids an understanding of this case to recognize at the outset that the Government's case was made entirely by the accomplice, Mike Mackin; if his testimony is disregarded, there is simply no case . . . What, and all, that implicates Williamson under proper criminal standards, is the testimony of Mackin. This is not the case, therefore, in which the accomplice applies significant testimony to overcome psychologically weak evidence by a categorical confession of guilt plus the inevitable finger pointed at the accused."

The court went on to point out various inconsistences in the testimony of the accomplice.

However, the court did not rely upon these inconsistences in reaching its decision to reverse, for on page 132 it states:

> "Besides the obvious weakness in the testimony of (the accomplice), and instruction of this kind seems especially needed here. In the first place, the law permits conviction in the federal court on the uncorroborated testimony of an accomplice. That means that it can be and frequently is of crucial importance and it most certainly was here. Evidence of that kind-and of that importance-is worthy of special attention by the trial judge as he translates the case into understandable terms for jury resolution. Especially it is so in this case. (The Defendant) could not, indeed did not, deny doing these acts. . . but were these acts taken to effectuate a scheme? Or were they innocent, though perhaps incautious acts of a loan officer handling papers in the regular frequent routine of the bank. The answer to that question turned entirely on belief or nonbelief of (the accomplice) for the final analysis, it is not the parties who determine the charge the judge gives to the jury. The obligation rests squarely on the shoulders of the trial judge. Of course the system of time-tested rules of procedure can rightfully expect competent counsel to request appropriate charges or object to affirmative errors or significant omissions. But there are occasions, and this Court recognizes them year by year, in which the trial court's erroneous action has such

> immediate and significant consequence that it must be noticed as plain error. We think the omission of the charge on accomplice testimony was plain error and the only way to eradicate it is to grant a new trial."

In the instant case, your Petitioner also admitted to certain acts which he claimed were all related to the printing and Distribution of an "adult " book.

It is strictly the testimony of the accomplice Howie which turns these acts into the steppingstones which lead finally to the crime charged.

Nor does this case contain a categorical confession of guilt by the accomplice Howie but, instead reveals a disavowance by Howie of any knowledge of what happened to the stamps after they were allegedly left with your Petitioner; although the Affidavit for Search Warrant referred to herein demonstrates otherwise.

However, like Williamson, it was more than the inconsistencies of the accomplices testimony and the admission of your Petitioner to acts which could be construed in more than one way, that demonstrated the crucial need for the trial court to give specific cautionary instruction on the testimony of the accomplice witness.

For the testimony of Howie was of crucial importance to the Government's case. It was upon Howie's testimony and the belief or nonbelief of the jury therein that the acts of your Petitioner were deemed innocent, or, became the means whereby your Petitioner aided and abetted his co-defendants in the crime set fourth in Count One of the Indictment.

In addition thereto, the failure of the trial court to instruct the jury on accomplice testimony violated your Petitioner's fundamental Constitutional rights to due process of law under Amendment V of the Constitution of the United States, as well as your Petitioner's right to a fair and impartial trial under Amendment VI of the Constitution of the United States.

CONCLUSION

This Honorable Court now has for a consideration a case in which the trial court failed to give cautionary instruction to the jury as to accomplice testimony.

Although this instruction was not requested by counsel, the court violated Petitioner's fundamental, constitutional right to a fair trial by failing to give this instruction sua sponte because of the following reasons:

1. The Government's case against your Petitioner was made entirely by the accomplice witness, Howie.

2. The testimony of the accomplice witness Howie was contradictory.

3. The testimony of the accomplice witness Howie was of crucial importance to this case.

4. Your Petitioner admitted to certain acts which could be interpreted as being innocent, or acts in furtherance of the crime charged depending upon the credibility of the accomplice Howie.

The Sixth Circuit Court of Appeals affirmed your Petitioner's conviction and in doing so, rejected Petitioner's argument that the trial court's failure to instruct the jury on accomplice testimony was plain and reversible error.

This Decision, Order and Judgment of the Sixth Circuit Court of Appeals is in direct conflict with the Decision of the Fifth Circuit Court of Appeals on the same matter, as well as being a fundamental violation of your Petitioner's constitutional right to a fair trial and due process of law.

For such reasons we respectfully urge that this Court grant Certiorari.

Respectfully submitted,

LAW OFFICES OF HARLAN STREET, P.A.
12700 Biscayne Boulevard
North Miami, Florida 33181
Attorneys for Petitioner

By 
HARLAN STREET

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed to Philip P. Durand, Valley Fidelity Bank Building, Knoxville, Tennessee, 37902, Gene A. Stanley, 1111 Northshore Drive, Knoxville Building, Knoxville, Tennessee 37012, F. Michael Ellis, Esquire Bank of Knoxville Building, Knoxville, Tennessee 37012, John L. Bowers, Jr., United States Attorney, Eastern District of Tennesse, Knoxville, Tennessee this 7th day of January, 1978.

LAW OFFICES OF HARLAN STREET, P.A.

By 
HARLAN STREET

Nos. 76-1454-5-6

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JAMES ARTHUR CHARLTON, *Defendant-Appellant* (76-1454) FRANKLIN N. JACEK, a/k/a FRANK ROYCE, *Defendant-Appellant* (76-1455) JAMES FRANCIS SWARTZ, *Defendant-Appellant* (76-1456)	APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed October 21, 1977.

Before: PHILLIPS, Chief Judge; EDWARDS and ENGEL, Circuit Judges.

ENGEL, Circuit Judge. This is an appeal by three defendants convicted of forging and counterfeiting fifty-cent postage stamps worth approximately $200,000, in violation of 18 U.S.C. §§ 501 and 2.[1] Of the numerous grounds asserted for reversal,

[1] 18 U.S.C. § 501 states in relevant part:

Whoever forges or counterfeits any postage stamp, postage meter stamp, or any stamp printed upon any stamped envelope, or postal card, or any die, plate, or engraving thereof; or

Whoever makes or prints, or knowingly uses or sells, or possesses with intent to use or sell, any such forged or counterfeited

APPENDIX "A"

only one merits extended treatment. Defendant James Arthur Charlton claims that in-custody oral statements given to the government agents on the evening of his arrest were made involuntarily. We hold that Charlton's statements, while voluntary under traditional tests, were taken in violation of the specific proscriptions of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and should not have been admitted into evidence against him. Nevertheless, we hold that the introduction of those statements was harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U.S. 18 (1967).

Charlton was arrested without a warrant at his home shortly after 10:00 p.m. on June 25, 1975. Earlier that evening special agents of the United States Secret Service, pursuant to a search warrant, entered offices rented by Charlton at 214 East Harper Street in Maryville, Tennessee, and seized large quantities of the counterfeit stamps and the paraphernalia for manufacturing them. Upon his arrest, Charlton was taken to the courthouse in Knoxville, Tennessee, where he was fingerprinted and otherwise processed in connection with his arrest. Approximately two hours later he was fully advised of his constitutional rights. He declined to sign a written waiver of those rights and instead responded that he wanted an attorney. He expressed no desire to talk to the agents. However, they questioned him, for only a short period apparently, in spite of his request. Shortly after 1:00 a.m. Special Agent MacVean Sweazey came into the room and said, "Well, got your son up here. What are you going to do about that?" Charlton did not answer Sweazey immediately, but the officer persisted with words to the effect that "if you want to keep your son, Mark, out of the case, he is (sic you are) going to have to explain how he was (sic you were) involved and show how Mark could be all around the counterfeiting operation and not know about it."

postage stamp, postage meter stamp, stamped envelope, postal card, die, plate, or engraving; . . . shall be fined not more than $500 or imprisoned not more than five years, or both.

Thereafter Charlton made the incriminating statements which were later introduced into evidence. The interrogation continued until about 3:00 a.m. No attorney was ever procured and Charlton refused to sign a written statement concerning the counterfeiting operation.

At a pretrial suppression hearing Charlton readily admitted that he had understood his rights, but claimed that he had been fatigued because the hour was late and he had worked all of the previous day in his employment as a draftsman for the Tennessee Valley Authority. In answering a question on direct examination as to whether he made the statement to the government of his own free will, Charlton stated:

> A. I talked to the postal inspector and Mr. Sweazey. I told them I would talk to them but the only thing, clear everybody out of the room and what I was going to say would be off the record.
>
> . . .
>
> Q. Listen to my question. Did you speak to them of your own free will?
>
> A. Not really. It wasn't, not in the way you put it. In other words —
>
> They actually got me mad because they kept hinting to the fact I didn't care anything about my son, and they actually used my son until they got me mad, really.

On cross examination Charlton basically repeated the story and explained:

> Well, they had stopped, this was about an hour later when they came back into the room and they said that my son had made a statement to them and that (sic) I want to help him. That is when they started using my son and that's when they got me mad, when they started using my son.

Charlton further claimed that the statement he gave was entirely fictitious.

At the conclusion of the hearing, the trial judge ruled:

> I hold that this statement can go to the jury, everything that was said there. There was no coercion, this man's coercion, that's — well, there isn't any basis for you saying that, Counsel, according to his own testimony. He said he was mad.

Charlton's testimony concerning the circumstances of his interrogation was unrefuted. The government called no witnesses.

The issue of voluntariness of a confession is a mixed question of fact and law. *United States* v. *Brown*, 557 F. 2d 541, 547 (6th Cir. 1977). The applicable standard is whether the confession was the product of a free and rational choice, and therefore the focus is upon the state of mind of the accused at the time the confession was made. In *Brown*, we quoted from *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961):

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

557 F.2d at 546. *See United States* v. *Washington*, 45 U.S.L.W. 4465, 4467 (U.S. May 23, 1977).

Upon our examination of the record and according appropriate deference to the trial judge's superior opportunity to observe the demeanor of the witnesses, we conclude that in the traditional sense Charlton's statements were voluntary.

There was no lengthy period of detention or repeated rounds of interrogation. There was no indication of any physical abuse. Charlton was informed of his constitutional rights and obviously understood them. He was not an impressionable youth, nor was he lacking in intelligence. *See Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973).

We have little doubt that the defendant was ultimately persuaded to testify by his anger at discovering that his twenty-year old son, Mark, had also been arrested. It was apparent at the suppression hearing and at the trial that the defendant was highly protective of Mark. Obviously anyone who knows his rights and determines to confess does so for a reason. That the defendant's reason was to protect his son does not, in our judgment, render his confession involuntary or necessitate a finding that he was coerced or that his will was overborne.

Of considerably greater difficulty is whether, although otherwise voluntary, Charlton's statement must nevertheless be suppressed because the government agents persisted in questioning him after he had declined to talk and had requested counsel. Defendant relies upon the following language in *Miranda*, *supra*, 384 U.S. at 473-74:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

(footnote omitted).

While the traditional determination of voluntariness had largely turned on a case-by-case consideration, *Miranda* required exclusion of any statements stemming from custodial interrogation unless the prosecution demonstrated compliance with its specific, prophylactic safeguards. Thus, if law enforcement officers fail to give the specified warnings before interrogation or fail to follow its guidelines during interrogation, the statement derived therefrom may be suppressed, even though it is otherwise "wholly voluntary." *Michigan* v. *Mosley*, 423 U.S. 96, 99-100 (1975); *Michigan* v. *Tucker*, 417 U.S. 433, 443 (1974).

In *Michigan* v. *Mosley*, *supra*, police questioning was held proper even though the accused had earlier indicated his desire to remain silent. There the Supreme Court rejected a strict rule which would totally preclude all further custodial interrogation. At the same time it observed that to construe *Miranda* to require only the immediate cessation of questioning would permit a resumption of interrogation after a momentary respite, which would undermine the will of the accused:

> Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.
>
> A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the

> person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . ." 384 U. S., at 479. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." *Id.*, at 474. Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored."

423 U.S. at 102-04 (footnotes omitted).

Turning to the facts here, Charlton declined to discuss the counterfeit operation, but the agents continued to question him for a presumably short period. Without giving further warnings, the agents later induced him to speak by stressing his son's precarious position if he remained silent. Charlton obviously did not succeed in persuading them to keep his statements "off the record."[2]

As for Charlton's request for counsel, the Supreme Court in *Michigan* v. *Mosley* explicitly noted that the case did not present the question of what procedures were required where such a request was made. However, in a concurring opinion, Justice White explicitly opined that whatever might be the propriety of resuming questioning after an accused had expressed a desire to remain silent, if an attorney was also requested. *Miranda* created a *per se* rule against further interrogation until

[2] There is no evidence that any of the officers ever promised such confidentiality to his statements. The rights which *Michigan* v. *Mosley* commands be "scrupulously honored" do not in our judgment include a right to control the use of a statement which is otherwise voluntarily given with full knowledge of its potential incriminatory value.

the attorney was in fact present, thus precluding a waiver. 423 U.S. at 109-110.

In spite of the literal language from *Miranda*, and of Justice White's observations about it, the prevailing conclusion among the courts of appeals is that a waiver is possible even after counsel has been requested. *See, e.g., United States* v. *Grant*, 549 F. 2d 942, 945 n. 4 (4th Cir. 1977); *United States* v. *Pheaster*, 544 F. 2d 353, 367-68 (9th Cir. 1976), *cert. denied*, 97 S.Ct. 124; *United States* v. *Womack*, 542 F. 2d 1047, 1050 (9th Cir. 1976); *Biddy* v. *Diamond*, 516 F. 2d 118, 122 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976).

In *United States* v. *Dority*, 487 F.2d 846 (6th Cir. 1973), we upheld the admission of a confession on the basis of a waiver by the defendant of the right to counsel. At the time federal agents sought to question him, the defendant was jailed on unrelated state charges. He did not request an attorney and proceeded to sign a waiver form, but unknown to the interrogating officers, the accused already had an appointed counsel acting for him in connection with the state offenses. The officers did not notify the attorney of the new federal charge before taking a statement. *Accord, United States* v. *Daniels*, 528 F. 2d 705, 707 (6th Cir. 1976).

But, in *Combs* v. *Wingo*, 465 F. 2d 96 (6th Cir. 1972), cited by defendant Charlton, our circuit took a stricter approach and found a violation of *Miranda* by the admission in a Kentucky state criminal trial of the defendant's confession made when counsel had been requested but not furnished. There, after indicating he wished an attorney, the defendant was shown the ballistic report on a rifle and bullet which allegedly had been used in the murder, whereupon he broke down and confessed. Concluding that the statement violated the *Miranda* guidelines, our court agreed with the dissenting judges in the Kentucky Court of Appeals that the act of showing the ballistic reports to the defendant was essentially a form of continued interrogation, the only possible object of

which was to break down the defendant's will and elicit the confession.

In the recent case of *Brewer* v. *Williams*, 45 U.S.L.W. 4287 (U.S. March 23, 1977), the defendant had been induced by the importunities of the law enforcement officers to reveal the whereabouts of his murder victim's body while being transported between two Iowa cities. The defendant already had an attorney but was separated from him during the trip with the express understanding that no questioning would take place in his absence.

In affirming the decision of the Eighth Circuit striking down the conviction, the majority declined to determine if the *Miranda* guidelines were violated and relied solely instead upon a denial of the Sixth Amendment right to counsel. It emphasized that a waiver was permissible, but only if the prosecution had proved "an intentional relinquishment or abandonment of a known right or privilege" under *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Applying that standard and indulging in every reasonable presumption against waiver, the Supreme Court concluded that the record fell far short of sustaining that burden, even though Williams was informed of his rights and appeared to understand them.

In *Brewer* v. *Williams* the defendant had already consulted his counsel following arrest and was formally arraigned. In contrast, defendant Charlton had no opportunity to receive initial advice of an attorney upon his express request, and the alleged waiver occurred only a short time after warnings were given and before any contact with the judicial system. Because of the differences in the factual pattern presented here, it is not clear from *Brewer* v. *Williams* that the Court would reject a *per se* rule under the literal language of *Miranda*. We need not decide that question here, because we conclude that the government failed to show a valid waiver in any event.

Under the strict standard of *Johnson* v. *Zerbst*, the mere demonstration that the confession came without objection after a resumption of questioning is inadequate evidence of

waiver. We conclude that the defendant here did not knowingly and intelligently waive his right to counsel. He refused to sign a waiver of rights and expressly requested counsel. He had initially refused to talk about the counterfeiting operation, but was questioned anyway. The information about Charlton's son was clearly presented in a coercive manner without warnings being given again. It cannot be said upon the record here that the officers scrupulously honored Charlton's decision to remain silent and to see an attorney. A heavy burden was upon the government and it was not met.

HARMLESS ERROR

At oral argument of this case the government urged for the first time that even if the confession given by Charlton violated his rights under *Miranda*, its admission under these circumstances was harmless beyond a reasonable doubt within the meaning of *Chapman* v. *California*, 386 U.S. 18 (1967). In *Chapman* a majority of the Supreme Court held that consistent with its earlier position in *Fahy* v. *Connecticut*, 375 U.S. 85 (1963):

> [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our *Fahy* case.

386 U.S. at 24 (footnote omitted).

At the same time, the Court observed in *Chapman* that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 386 U.S. at 23. It cited as an example *Payne* v. *Arkansas*, 356 U.S. 560 (1958), wherein the admission of a plainly

coerced and involuntary confession was held to require a new trial. There the Court held that "even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment." 356 U.S. at 568.

While other decisions of the Supreme Court have held that the admission of an involuntary confession commands reversal regardless of other evidence of guilt, *see, e.g., Haynes* v. *Washington*, 373 U.S. 503, 518 (1963); *Lynumn* v. *Illinois*, 372 U.S. 528, 537 (1963), at least one recent decision has apparently applied the harmless error rule in the context of an alleged involuntary confession. *Milton* v. *Wainwright*, 407 U.S. 371 (1972). There, at petitioner Milton's state murder trial, the prosecution introduced evidence of his admissions and statements made to a police officer named Langford, who had gained his confidence while posing as a cell mate. At the time Milton was represented by appointed counsel in the pending proceeding. The Court assumed arguendo that the statements were involuntary under Fifth Amendment standards. However, it found their admission was harmless beyond a reasonable doubt, especially noting that the overwhelming evidence included no less than three full and validly obtained confessions. Of interest, the dissenting justices, while disputing the appropriateness of application of the harmless error rule on the facts, did not claim that it was unavailable, because of the nature of the constitutional violation.

On the other hand, our circuit, without expressly addressing the issue, has rather consistently applied the *Chapman* rule where otherwise appropriate, if the constitutional error involved the admission of confessions secured in violation of the *Miranda* guidelines, though otherwise voluntary under the traditional analysis. *See, e.g., United States* v. *Eagleton*, 437 F. 2d 451, 452 (6th Cir. 1971); *Whitesell* v. *Perini*, 419 F. 2d 95, 96 (6th Cir. 1969); *United States* v. *Smith*, 418 F. 2d 223, 224 (6th Cir. 1969). *Cf. Hayton* v. *Egeler*, 533 F. 2d 599, 603 (6th Cir. 1977); *Minor* v. *Black*, 527 F. 2d 1, 5 (6th Cir. 1975), *cert. denied*, 427 U.S. 904 (1976).

While *Miranda* and the decisions which follow it are premised upon constitutional considerations, there are differences between those confessions which are inherently coercive and which have been traditionally stricken as lacking in voluntariness and those which, though otherwise voluntary, have failed to comply with the strict procedural requirements of *Miranda*. *See Smith* v. *Estelle*, 527 F. 2d 430 (5th Cir. 1976).

We are not required to reach the question of what circumstances, if any, allow the application of the harmless error rule in *Chapman* v. *California* where the confession is coerced and violates traditional standards of voluntariness. It is sufficient here to hold that where a confession, otherwise voluntary, is inadmissible for failure to comply with the strict procedural requirements of *Miranda*, reversal is not required if, upon the facts, the court can find beyond a reasonable doubt that its use at trial was harmless and could not have affected the outcome. We see no reason why in such circumstances the court may not weigh the therapeutic benefits of *Miranda* against the very real burden upon the system and the parties of requiring a new trial where the issue could never seriously be in doubt.

Applying the *Chapman* harmless error rule here, we conclude that there is no reasonable doubt either of Charlton's guilt or the fact that conviction would as surely have followed had his statements not been received. The evidence was overwhelming.

Charlton's involvement was shown by extensive physical and testimonial evidence that directly implicated him in the counterfeiting operation. Secret Service Agent Semansky, who executed the search of the East Harper Street building, testified that several thousand sheets of the counterfeit stamps were seized as well as the press, hole perforator, plates, and

other paraphernalia used in their production. Charlton's fingerprints were found on some of those stamps and plates, and there was no doubt that he fully controlled the premises on East Harper Street. Although Charlton's son had technically rented the building, the second installment of rent had been paid by the DBD Corporation, controlled and formed by Charlton. Numerous suppliers of materials and equipment testified that Charlton had made purchases. Charlton's own son testified to his discovery and knowledge of bags of stamps and plates on the premises several weeks earlier and was once asked to leave by his father as he approached the operating machinery. Co-defendant Howie, after pleading guilty, testified to Charlton's involvement and to the arrangement by which the anticipated proceeds were to be divided.

On the other hand, testimony concerning the incriminating statement, while received at trial, was not unduly emphasized. The statement included an admission by Charlton of his involvement in the illegal operation, but also contained at least a feeble effort to establish a defense of duress. If not very credible, it appears to have been the only defense which Charlton was able to pursue at the trial and his counsel at least made an effort to present it through cross-examination. Charlton did not himself testify.

Numerous other assertions of error are made with respect to all three defendants. Upon an examination of the entire record, the court finds that the district court did not err, upon the facts before it, in refusing an evidentiary hearing concerning allegations of omissions of material facts by the government agents in preparing the affidavit in support of the search warrant.

Likewise, the trial court did not err in refusing to suppress and exclude evidence obtained by the search warrant, as we find without merit the appellants' claim that the facts set forth in the affidavit were insufficient to establish probable cause. Also, contrary to the claims of the appellants, the

district court fairly instructed the jury on all the applicable issues. Finally, the court did not err in denying appellant Swartz's application for a continuance, and as to him there was ample evidence to support the jury verdict finding him guilty.

The court being of the opinion that in all other respects the defendants received a fair trial, free from any prejudicial error, the judgment of the district court is affirmed.

No. 76–1455

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff–Appellee

V.

FRANKLIN NEIL JACEK,

Defendant–Appellant

ORDER

FILED

DEC. 7, 1977

JOHN P. HELMAN, CLERK

Before: PHILLIPS, Chief Judge; EDWARDS and ENGEL, Circuit Judges

Franklin Jacek, appellant herein, has filed a motion for leave to file a petition for rehearing out of time on November 14, 1977. With that motion, he tendered a petition for rehearing.

Upon consideration, although the court expresses reservations concerning the failure of counsel filing the motion to obtain proper substitution of present counsel or to obtain the approval of this court for the relief of the former counsel on appeal, on consideration,

IT IS ORDERED that the motion is hereby granted.

Upon consideration of the petition for rehearing herein accepted for filing, the court being of the opinion that the same is without merit.

APPENDIX "B"

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

John P. Helman

Clerk